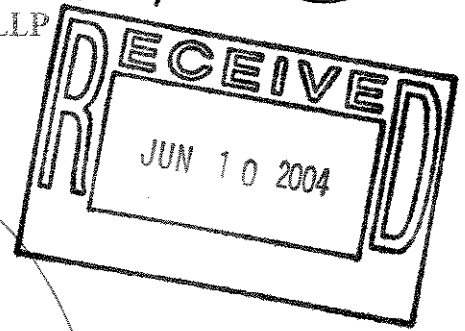


ANDERSON & KREIGER LLP

STEPHEN D. ANDERSON
sanderson@andersonkreiger.com

Dor
Please Note:
this is in reference
to the Dor opinion
you requested June 9, 2004
JK



Daniel Murphy, Chief
Property Tax Bureau
Department of Revenue
51 Sleeper Street
PO Box 9494
Boston, MA 02205

RE: Request for DOR Opinion as to Proposed Use of Community Preservation Funds to Support Acquisition of Restricted Affordable Housing Units by Acton Housing Authority

Dear Chief Murphy:

As Town Counsel for the Town of Acton, I am writing to you on behalf of the Acton Community Preservation Commission respectfully to request your written opinion as to the propriety of the proposed use of Community Preservation Funds to support acquisition of restricted affordable housing units by the Acton Housing Authority. Specifically, on the recommendation of the Community Preservation Commission, Acton's 2004 Annual Town Meeting has authorized the use of \$200,000 in Community Preservation Act ("CPA") funds to support (along with a developer's \$300,000 donation) the Acton Housing Authority's purchase of two condominium units which will be deed restricted for occupancy by income-eligible households. The Housing Authority will own and maintain these units in its rental housing inventory, and the units will be further subsidized under the Department of Housing and Community Development's ("DHCD") Chapter 705 housing program.

In light of the provisions of Chapter 44B, Section 12(b) and the Department of Revenue's ("DOR's") IGR 00-209, the CPC has requested an opinion whether it is permissible for CPA funds to be used in this manner. For the reasons set forth below, as Town Counsel, I have concluded that it is permissible. However, as this interpretation goes beyond a literal reading of Section 12 and the DOR's IGR, I have recommended that the CPC confirm this interpretation with DOR. The purpose of this letter is to request that confirmation.

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Use of CPA Funds for Acquisition of Real Property

The potential problem regarding a grant to the housing authority toward its acquisition of affordable housing units derives from the CPA's language in Chapter 44B, Section 12(b), which provides as follows (emphasis added):

Real property interests acquired under this chapter shall be owned and managed by the city or town, but the legislative body may delegate management of such property to the conservation commission, the historical commission, the board of park commissioners or the housing authority, or, in the case of interests to acquire sites for future wellhead development by a water district, a water supply district or a fire district. The legislative body may also delegate management of such property to a nonprofit organization created under chapter 180 or chapter 203.

In IGR 00-209, section V.B, DOR has interpreted this provision literally as follows (emphasis added):

Ownership and Management

The city or town must own any real property interest acquired or taken with community preservation monies. Management of the properties may be delegated by the legislative body to the conservation commission, historical commission, park commission or housing authority, as appropriate, or to a nonprofit corporation created under G.L. Ch. 180 or nonprofit trust, created under G.L. Ch. 203. Management of properties acquired for future wellhead development may be delegated by the legislative body to a water, water supply or fire district. G.L. Ch. 44B Section 12(b).

Technically, a Housing Authority is not an instrumentality of the town; rather, it is subdivision of the Commonwealth, and is under the direct control and supervision of the Department of Housing and Community Development. G.L. c. 121B, §§ 11, 32; *Comm'r of DCA v. Medford Hous. Auth.*, 363 Mass. 826 (1973). For example, any new rental housing project must be first approved by DHCD. G.L. c. 121B, § 31. Thus, any land that is owned by the Housing Authority is technically not owned by the Town.

Use of CPA Funds to Support Expansion of the Affordable Housing Supply

By contrast, under Chapter 44B, Section 5, CPA funds may be appropriated for "the creation, preservation, and **support of community housing**." The word "acquisition" is not specifically among the listed purposes for which CPA money may be appropriated with respect to community housing; and the word "support" is not specifically among the listed purposes for which CPA money may be appropriated for the other categories of community assets (open space, historic resources, recreation resources). Yet in the same IGR, DOR has interpreted "support" broadly to include cash payments to housing authorities to expand the town's affordable housing inventory. See IGR 00-209, p. 11 (emphasis added).

These purposes are more specifically defined in the act. (See attached glossary). **The term "support" would include expenses such as annual payments to the housing authority to preserve or expand the affordable housing supply.**

Under the generic Housing Authority enabling statute, G.L. c. 121B, sections 19 and 20, a town may appropriate funds to its housing authority for a variety of uses, ranging from annual administrative expenses to the acquisition and maintenance of housing units. Without limitation, under Section 20 (emphasis added):

A city or town in which an operating agency [i.e. a housing authority] has been organized may raise and appropriate, or may borrow, or may agree with such agency or with the federal government or the commonwealth to raise and appropriate or to borrow, in aid of such agency, such sums as may be necessary for:--

(1) defraying all the development, acquisition and operating costs of a clearance, urban renewal, community renewal, relocation, rehabilitation or low-rent housing project within such city or town;
or

(2) defraying such part of the development, acquisition and operating costs of any such project to which either the federal government, pursuant to federal legislation, or any other source has rendered or has agreed to render financial assistance, as will not be met by loans other than

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temporary loans or by contributions or grants other than annual or other contributions and grants in the nature of reimbursement from the federal government or from any such other source

In addition, under Chapter 121B, Section 23, a town can convey, with or without consideration, "any of its interests in any property" to the housing authority in aid of its functions (emphasis added):

For the purpose of complying with the conditions of federal legislation, or in lieu of a contribution, loan or grant in cash to an operating agency organized within its limits, or to aid and cooperate in the planning, construction or operation of any project of such an agency, **a city or town, or the appropriate board or officer thereof on behalf of such city or town, may upon such terms, and with or without consideration, do or agree to do any or all of the following things**, as such city, town, board or officer, as the case may be, may determine:--

(a) Sell, **convey** or lease **any of its interests in any property**, or grant easements, licenses or any other rights or privileges therein **to such agency [i.e. the housing authority]** or to the federal government;

....

Reconciliation of Apparently Conflicting Statutory Provisions

The question then is how to reconcile the apparently conflicting CPA mandates that (a) the "town must own any real property interest acquired or taken with community preservation monies", and (b) the town can appropriate CPA money to the housing authority to "expand the affordable housing supply."

This question is particularly important because the CPA defines "community housing" as "low and moderate income housing for individuals and families...", which can include both rental and ownership properties. Ownership properties are owned by private individuals or families (subject to deed restrictions to maintain their perpetual affordability), not by the Town. Thus, if one were to give section 12 literal effect (precluding non-municipal entities from owning community housing assets), the result would be that CPA-funded "community housing" would be limited solely to rental housing acquired and owned by the Town.

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As Town Counsel, I consider it doubtful that this was the intention of the legislature, particularly since this interpretation would undermine, not enhance, many of the powers of cities and towns under Chapter 121B in dealing with their housing authorities. Rather, given the legislature's stated intention for the CPA to be used to expand the affordable housing supply, as Town Counsel I have indicated that it is reasonable to conclude that municipalities can make certain appropriations to housing authorities in furtherance of expanding the town's affordable housing inventory, without the Town needing to own each and every housing asset whose acquisition was subsidized in part with CPA funds.

Accordingly, I have recommended the following guidelines for determining whether the use of CPA funds is allowed under Section 5 or prohibited under Section 12 (unless the Town will own the real property in question):

- If community housing is acquired solely or predominantly using CPA funds, then the Town must own the real property so acquired (which would mean as a practical matter that the housing would be added to the Town's rental stock of affordable housing and the management of the units would likely be delegated to the housing authority under section 12); and
- If the acquisition of community housing is **supported** by the use of CPA funds, but the CPA funds are not the sole or predominant source of the purchase money, then the CPA funds may be so used under section 5; however, the Town should be a beneficiary of the recorded affordable housing restriction (the real property interest acquired or taken with community preservation monies) to comply with Section 12.

As this interpretation goes beyond a literal reading of section 12 or the DOR's IGR, the CPC respectfully asks that DOR either confirm this interpretation or indicate how it differs with this interpretation.

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This matter is time-sensitive as the appropriation has been approved by Town Meeting and the Housing Authority is anxious to move forward with its affordable housing initiatives. Accordingly, we look forward to your response at your earliest convenience. Thank you.

Sincerely,



Stephen D. Anderson

SDA/lb

cc: Don Johnson, Town Manager (via fax and mail) ✓
John Murray, Assistant Town Manager (via fax and mail)

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